

December 13, 2004

D.T.E. 02-38-B

Investigation by the Department of Telecommunications and Energy on its own Motion into Distributed Generation.

ORDER ON JOINT MOTION FOR CLARIFICATION

I. INTRODUCTION

On June 13, 2002, the Department of Telecommunications and Energy (“Department”) issued an Order opening a Notice of Inquiry into distributed generation (“DG”).¹ Distributed Generation NOI, D.T.E. 02-38 (2002). The Department requested comments on: (1) whether current distribution company interconnection standards and procedures in Massachusetts act as an undue barrier to the installation of DG; (2) whether current distribution company standby service tariffs act as a undue barrier to the installation of DG; (3) what the role of DG is with respect to the provision of service by Massachusetts distribution companies; and (4) what other issues are appropriate for the Department to consider. Id. at 5.

On February 24, 2004, the Department approved a model tariff governing the interconnection of DG for distribution service (“Model Interconnection Tariff”). Distributed Generation, D.T.E. 02-38-B (2004) (Order on Model Interconnection Standards and Procedures Tariff).² The Model Interconnection Tariff applies to Boston Edison Company, Cambridge Electric Light Company, Commonwealth Electric Company, Fitchburg Gas and Electric Light Company, Massachusetts Electric Company and Nantucket Electric Company, and Western Massachusetts Electric Company (collectively, “Distribution Companies”). The

¹ Distributed generation is “a generation facility or renewable energy facility connected directly to distribution facilities or to retail customer facilities which alleviate or avoid transmission or distribution constraints or the installation of new transmission facilities or distribution facilities.” G. L. c. 164, § 1. A “generation facility” means plant or equipment that is used to produce, manufacture, or otherwise generate electricity and which is not a transmission facility. G.L. c. 164, § 1; 220 C.M.R. § 11.02.

² For a more complete procedural history in this case see D.T.E. 02-38-B at 1-3.

Model Interconnection Tariff is based on a submission by the Massachusetts Distributed Generation Collaborative (“DG Collaborative”) which was formed at the direction of the Department. Distributed Generation NOI, D.T.E.02-38-A (2002).³ The Department also approved a report filed by the DG Collaborative entitled, “Proposed Uniform Standards for Interconnecting Distributed Generation in Massachusetts” (“Report”).

D.T.E. 02-38-B at 34-35, 41-42.

On March 15, 2004, the Distribution Companies filed a joint motion for clarification of D.T.E. 02-38-B concerning the degree of responsibility regarding potential cost overruns stemming from unanticipated or unforeseen events (“Joint Motion”). On April 6, 2004, Aegis Energy Services, Inc., RealEnergy, Inc., Turbosteam Corporation, (together the “DG Group”) filed a response to the Joint Motion (“Joint Response”).

³ The members and participants in the DG Collaborative were: Aegis Energy Services; Associated Industries of Massachusetts; the Attorney General of the Commonwealth; Bill Feero; Cape Light Compact; Commonwealth of Massachusetts Division of Energy Resources; The E Cubed Company, LLC; Fitchburg; ISO New England, Inc.; Ingersoll-Rand, Inc.; KeySpan Energy Delivery (Boston Gas Company, Colonial Gas Company and Essex Gas Company each d/b/a KeySpan Energy Delivery New England); Mass Technology Park Corporation d/b/a Massachusetts Technology Collaborative; MECo; Massachusetts Energy Consumers Alliance; MeadWestvaco Corporation; National Association of Energy Service Companies; Navigant Consulting, Inc.; Northeast Energy and Commerce Association; Northeast Combined Heat and Power Initiative; NSTAR; Plug Power, Inc.; Raab Associates; RealEnergy, Inc.; Solar Energy Business Association of New England; Solutia; Trigen Energy; Union of Concerned Scientists, et al. (Conservation Law Foundation, Massachusetts Public Interest Research Group); United Technologies Corporation; WMECo; and Wyeth BioPharma.

II. THE JOINT MOTION AND JOINT RESPONSE

A. The Joint Motion

At issue in the Joint Motion is the following provision of the Model Interconnection Tariff:

The Company will, in writing, advise the Interconnecting Customer in advance of any cost increase for work to be performed up to a total amount of increase of 10% only. All costs that exceed the 10% increase cap will be borne solely by the Company. Any such changes to the Company's costs for the work shall be subject to the Interconnecting Customer's consent. The Interconnecting Customer shall, within thirty (30) days of the Company's notice of increase, authorize such increase and make payment in the amount up to the 10% increase cap, or the Company will suspend the work and the corresponding agreement will terminate.

D.T.E. 02-38-B at 14 (citing Model Interconnection Tariff at 48, ¶ 5.1, 71-72, ¶ 7 and 74-75, ¶ 7 (Exh. A, Interconnection Service Agreement; Exh. F, Impact Study Agreement, ¶ 7; and Exh. G, Detailed Study Agreement, ¶ 7)).

The Distribution Companies request that the Department clarify D.T.E. 02-38-B to state that the ten percent cap on costs applies only to those costs over which the Distribution Companies have control (Joint Motion at 5). The Joint Motion argues that although the Distribution Companies agree that good faith estimates for interconnection costs are imperative, this incentive only makes sense to the extent that interconnection costs are within the Distribution Companies' control and are foreseeable (*id.* at 3). The Joint Motion argues that unknown circumstances may exist such that the Distribution Companies can not know in advance what the resultant costs will be (*id.*). The Joint Motion provides examples of unforeseen circumstances such as: (1) abandoned infrastructure under city streets not shown on a map; (2) ledge or environmental contamination; (3) drastic changes in equipment and

material costs; (4) permitting costs (id. at 4). The Distribution Companies argue that if the language in the Model Interconnection Tariff were to apply to all costs, those both known and foreseeable and unknown and outside of the Distribution Companies' control, the Distribution Companies might find it necessary to give higher cost estimates in all cases, in order to protect themselves and their customers from responsibility from such unknown and unforeseen circumstances (id.).

B. The Joint Response

The DG Group argues that the Joint Motion should be denied because the Department's resolution of this issue was clear and correct (Joint Response at 2). The DG Group notes that the Distribution Companies did not propose in the DG Collaborative discussions the "known/unknown" cost distinction they now seek (id.). The DG Group argues that the Joint Motion seeks not a clarification at all, but instead a modification of the Department's Order (id. at 3). The DG Group contends that the proposed modification would invite disputes and litigation (id.). The DG Group adds that the Department accepted the DG Collaborative's recommendation to adopt the Model Interconnection Tariff on an interim basis (id. at 4). The DG Group points out that the issue raised by the Joint Motion can be reviewed and revisited at the end of the interim period to determine if the speculation of the Distribution Companies' proves accurate (id.).

III. STANDARD OF REVIEW

Clarification of previously issued orders may be granted when an order is silent as to the disposition of a specific issue requiring determination in the order, or when the order contains language that is so ambiguous as to leave doubt as to its meaning. Boston Edison Company, D.P.U. 92-1A-B at 4 (1993); Whitinsville Water Company, D.P.U. 89-67-A at 1-2 (1989). Clarification does not involve reexamining the record for the purpose of substantively modifying a decision. Boston Edison Company, D.P.U. 90-335-A at 3 (1992), citing Fitchburg Gas & Electric Light Company, D.P.U. 18296/18297, at 2 (1976).

IV. ANALYSIS AND FINDINGS

The Model Interconnection Tariff, as adopted, modified the DG Group's proposed terms to make it so that the tariff would not "be misconstrued to hold the Interconnecting Customer responsible to pay an overage amount greater than ten percent before the Distribution Company can continue interconnection work." D.T.E. 02-38-B at 14, n.17. The Department explained that this provision of the Model Interconnection Tariff would:

establish a ten percent cost threshold, where, if the Distribution Company's cost estimate is greater than ten percent, the Distribution Company would be entirely responsible for any overage greater than ten percent. The Department believes that such language would create an incentive for the Distribution Companies to make good faith estimates for interconnection costs.

Id. at 14.

The Department sought to promote rigor and accuracy in the Distribution Companies' pre-construction estimates of interconnection costs. We did not intend to assign all costs, both foreseen and unforeseen, to the Distribution Companies. Rather we sought to promote good

faith in preparing Distribution Companies' estimates. Estimates are seldom exact forecasts of actual costs. Circumstances can change between the application for interconnection and the construction of the interconnection facilities. As the Distribution Companies noted, unforeseen circumstances, such as abandoned infrastructure, ledge, or environmental contamination, may cause actual costs to exceed estimated costs by a significant amount. As the Department continues to examine the interconnection process, we need to watch for the effect of interconnection estimates on the Distribution Companies' finances.

Good faith is essential to translating specifications into cost estimates. Even acting in good faith, a cost estimator is limited by what is known, or what reasonably can be assumed, at the time of the cost calculation. "‘Good faith’ means honesty in fact in the conduct or transaction concerned." G.L. c. 106, § 1-201(19). Further, Distribution Companies are charged with the knowledge of the make-up of their service areas and of what is required to interconnect facilities to their systems. The interconnecting customer has a justified expectation that a Distribution Company will, within reasonable limits, provide an accurate statement of the costs of interconnection.

Our reading of the Joint Motion points to potential problems with the estimation/cost responsibility provisions of the Model Interconnection Tariff. With cost responsibility accruing to the Distribution Companies for all costs in excess of the ten percent threshold, Distribution Companies may prepare otherwise higher estimates to protect their financial interests against potential unforeseen costs. These resulting higher cost estimates may unduly inhibit the installation of DG, in contravention of Department policy. Also, Distribution

Companies may end up with cost responsibility for circumstances that were wholly unknown and unforeseen at the time the estimate was made, resulting in an unfair subsidy of DG.

To establish a coherent policy regarding cost responsibility requires empirical information not merely theoretical propositions. That information may be available from the DG Collaborative. The DG Collaborative has recognized that because there is limited DG experience relating to cost estimates, the DG Collaborative proposed an ongoing DG Collaborative to review this, and other issues, that may arise from the implementation of the Model Interconnection Tariff (Report at 25). The Department accepted this proposal, directed the Distribution Companies to support the DG Collaborative, and authorized a two-year ongoing collaborative process, consistent with the DG Collaborative's proposals in sections two and six of the Report at 8, 29-32 ("Goals and On-Going Collaborative" and "On-Going Collaboration and Information Tracking"). D.T.E. 02-38-B at 35. After evaluating its experience under the Model Interconnection Tariffs, the DG Collaborative could recommend changes to the Model Interconnection Tariffs, including language clarifying the accuracy of cost estimates to interconnect DG.⁴

In conclusion, although the Department recognizes that inequities could result from the Department's ruling on cost responsibility for cost overruns, we require additional evidence

⁴ In addition, the Model Interconnection Tariff provides for a detailed dispute resolution process. Model Interconnection Tariff at §§ 9.00 et seq. Under this process, a Distribution Company or a DG customer could conduct good faith negotiations over responsibility for unforeseen or unanticipated costs. See Model Interconnection Tariff at § 9.1

before changing the current provision in the Model Interconnection Tariff.⁵ Accordingly, the Department denies the Motion for Clarification of the Distribution Companies. Furthermore, we direct the Distribution Companies, as part of the DG Collaborative, to develop information pertaining to the calculation of cost estimates, the comparison of estimated to actual costs, and the effect, if any, of cost estimates on the installation of DG.

V. ORDER

Accordingly, after due notice, and consideration, the Department

DENIES: The Joint Motion for Clarification filed on March 15, 2004, by Boston Edison Company, Cambridge Electric Light Company, Commonwealth Electric Company, Fitchburg Gas and Electric Light Company, Massachusetts Electric Company and Nantucket Electric Company, and Western Massachusetts Electric Company; and

⁵ We note that the Interconnection Service Agreement expressly provides for events that might be “beyond the reasonable control of the affected party” in the “Force Majeure” provision. Model Interconnection Tariff at 52-53, ¶ 16 (Interconnection Service Agreement). This provision provides Distribution Companies and DG customers some protection from unforeseen or unanticipated costs. Id.

ORDERS: The Distribution Companies to comply with all directives contained in this Order.

By Order of the Department,

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Paul G. Afonso, Chairman

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James Connelly, Commissioner

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W. Robert Keating, Commissioner

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Eugene J. Sullivan, Jr., Commissioner

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Deirdre K. Manning, Commissioner